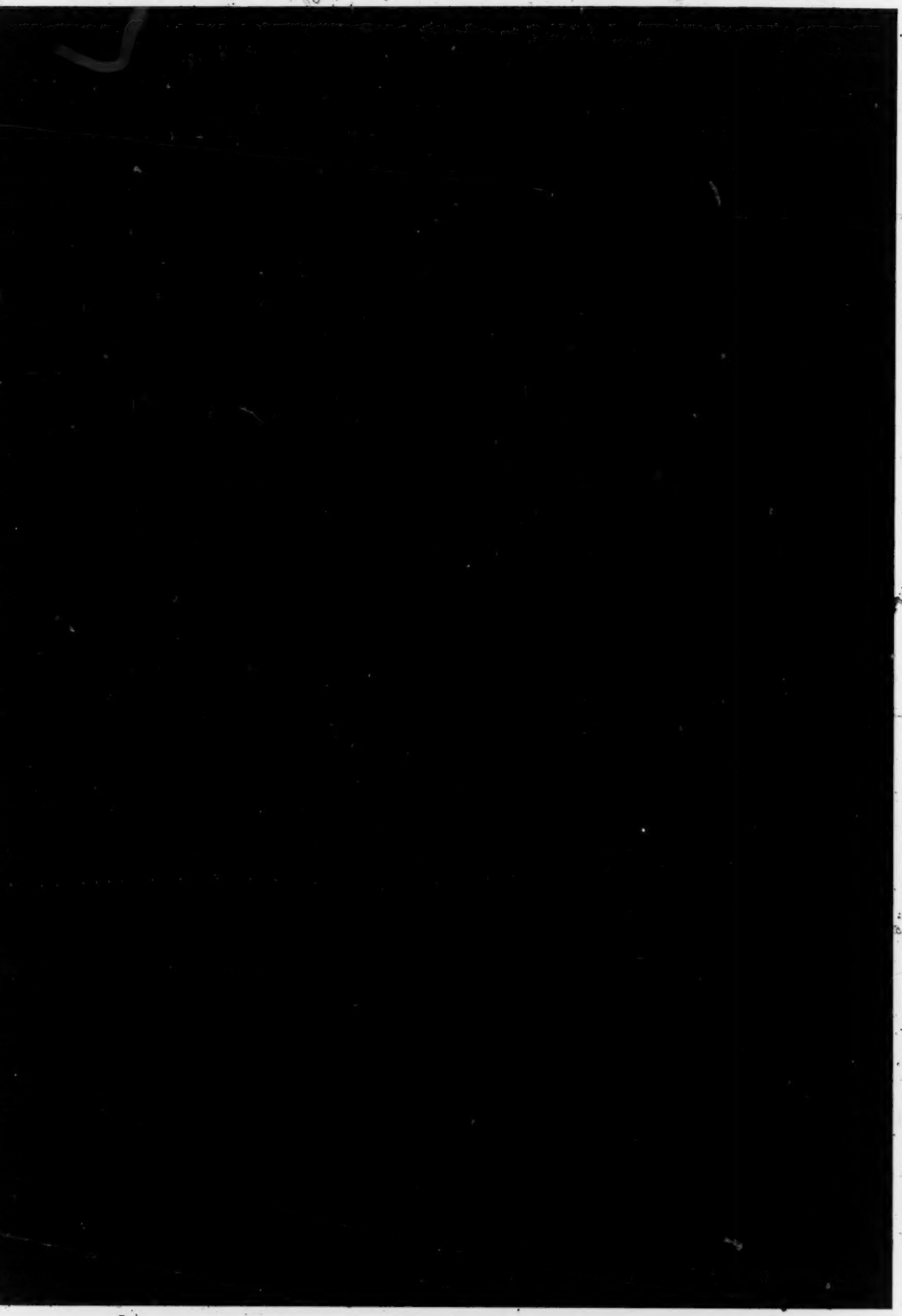

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ET AL., APPELLANTS

v.

THE STATE OF WASHINGTON, ET AL.

No. 247

THE PUYALLUP TRIBE, PETITIONER

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, ET AL.

No. 319

NUGENT KAUTZ, ET AL., PETITIONERS

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, ET AL.

ON APPEAL FROM, AND PETITIONS FOR WRITS OF CERTIORARI TO, THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of October 9, 1967, the Solicitor General was invited to express the views of the United

281-519—67——1

States with respect to these cases involving the off-reservation fishing rights of certain Indian tribes in the State of Washington.

Each of the cases was initiated by the Washington Game and Fisheries Departments to enjoin Indians who claim immunity under federal treaties from conducting their fishing operations in violation of the conservaton laws of the State. In No. 246 the defendants (petitioners here) are members of the Muckleshoot Tribe asserting fishing rights under the Point Elliot Treaty of January 22, 1855 (12 Stat. 927); in No. 247 and No. 319, the defendants are Puyallup Indians and Nisqually Indians, respectively, asserting fishing rights under the Treaty of Medicine Creek, signed December 26, 1854 (10 Stat. 1132). The Supreme Court of Washington held in No. 246 that the Muckleshoot Indians had no rights under the Point Elliot Treaty[1] (J.S. A46–A53).[2] In No. 247 and No. 319, the State court recognized that the beneficiaries of the Treaty of Medicine Creek still enjoyed "a right to fish at all usual and accustomed grounds," but held the right subject to regulation under State conservation laws "reasonable and necessary for the preservation of the fishery" (J.S. A24–A25, A43–A44).

[1] The State Supreme Court held that the correctness of the trial court's factual finding on this point could not be considered on appeal because the issue had not been properly raised in the assignment of error (J.S. A48).

[2] All of our references are to the Appendix to the Jurisdictional Statement in No. 246 which reproduces the opinions of the court below in all three cases.

While the issue seems precluded in No. 246, the other two cases present a question of importance: the extent of off-reservation fishing rights which have been guaranteed to the Indians by federal treaties. The matter affects not only the Indians now before the Court, but also more than a dozen other Tribes in the Pacific Northwest, beneficiaries of several treaties with almost identical provisions.[3] Although this Court has had occasion to speak to the question, it remains largely unresolved. The problem is acute, provoking bitter disputes and conflicting judicial decisions. Currently, the Secretary of the Interior has undertaken to regulate Indian fishing in a manner which provides for cooperation with State authorities,[4] but those efforts are embarrassed by the absence of a definitive ruling on the scope of the rights secured by treaty. In the circumstances, we suggest the Court might appropriately grant certiorari.

The issue arises because many treaties with Indian tribes expressly reserved to them with respect to lands

[3] See Treaty of Point Elliot (12 Stat. 927), Art. V (Suquamish, Swinamish, Lummi and others); Treaty of Point no Point (12 Stat. 933), Art. IV (Skokomish); Treaty with the Makah (12 Stat. 939), Art. IV; Treaty of Walla-Walla (12 Stat. 945), Art. I (Umatilla); Treaty with the Yakama (12 Stat. 951), Art. III; Treaty with the Nez Perce (12 Stat. 957), Art. III; Treaty of Wasco (12 Stat. 963), Art. I (Warm Springs); Treaty with the Quinaielt (12 Stat. 971), Art. III; Treaty with the Flatheads (12 Stat. 975), Art. III.

[4] We reproduce the Secretary's present regulations in an appendix, *infra*, pp. 7–17. It will be noted that Section 256.2 contemplates detailed area regulations—which have not yet been promulgated. Of course, the regulations do not purport to diminish or enlarge the rights guaranteed by treaty. See § 256.7 (b), (c).

ceded to the United States the right "to take fish at all usual and accustomed grounds and stations * * * in common with all citizens of the Territory."[5] Some have read this language as securing to the Indians only a right of equal access to certain fisheries open to others, which subsists only so long, and so far, as ordinary citizens are permitted to fish there. That view, we believe, has been rejected by this Court. *E.g.*, *United States* v. *Winans*, 198 U.S. 371; *Seufert Bros. Co.* v. *United States*, 249 U.S. 194; *Tulee* v. *Washington*, 315 U.S. 681. But the holding that these treaty provisions do more than exempt the Indians from discriminatory State laws does not end the matter. It remains to define the extent of the right reserved.

Do the treaties secure an absolute and unqualified right to fish at specified locations which the State is forbidden to inhibit whatever the consequences, as the Idaho Supreme Court seems to have held? See *State* v. *Arthur*, 74 Idaho 251, 261 P. 2d 135. Is the right subject to restriction by the State when it is "indispensable" to do so in the interest of necessary conservation, if that end "cannot be accomplished by a restriction of the fishing of others," as the Court of Appeals for the Ninth Circuit held in *Maison* v. *Confederated Tribes of the Umatilla Indian Reservation*, 314 F. 2d 169, 173? Or does the State merely bear the burden of showing that a restriction is generally neces-

[5] This is the language of the Treaty of Medicine Creek, involved in Nos. 247 and 319. The provision of the Point Elliot Treaty invoked in No. 246 is the same, except for the immaterial omission of the adjective "all" preceding "usual and accustomed grounds." The other treaties cited in n. 8, *supra*, contain substantially identical provisions.

sary to conserve the fishery, without inquiring whether it is possible to exempt the Indians with respect to the locations where their treaty rights apply? That seems to have been the approach of the Washington Supreme Court in the cases at bar. We believe the opinions below give inadequate recognition to the federally secured fishing rights of the Indians of the Pacific Northwest. At all events, however, these and other questions press for authoritative resolution and we submit the pending cases offer an appropriate occasion to end the conflict of decisions by announcing the controlling standards.

CONCLUSION

Accordingly, we urge the Court to grant the petitions for certiorari in Nos. 247 and 319.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.